IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 8TH OCTOBER 2007 / 16TH ASWINA 1929

Crl.L.P..No. 822 of 2007()

C.C.NO.588/05 OF J.M.F.C, ERATTUPETTA

PETITIONER/COMPLAINANT

SHAJI.E.P.
EDATHUMKUNNEL HOUSE,
ERATTUPETTA

BY ADV. SRI.P.C.HARIDAS

RESPONDENTS: ACCUSED
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1. DR.DOMINIC THOMAS,
NELLUVELIL HOUSE,
COLLEGE JUNCTION, ERATTUPETTA.

2. STATE OF KERALA REPRESENTED BY ITS
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERANAKULAM.

R2-BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD ON 08/10/2007, ALONG WITH CRL.LP.NO.886/07, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.L.P.NOS.822 & 886 OF 2007

Dated this the 8th day of October, 2007.

O R D E R

These special leave to appeals have been filed against the judgments in C.C.Nos.588/2005 and 589/2005 on the file of the Judicial Magistrate of First Class, Erattupetta. In both the complaints, it was alleged that the 1st respondent/accused had borrowed a total amount of Rs.1,20,000/= from the petitioner/complainant and for the return of the said amount, the 1st respondent had issued two cheques each for Rs.60,000/=. When the cheques were presented for encashment, one of the cheques was dishonoured on the ground of insufficiency of fund with the account of the 1st respondent and the other cheque was returned with an endorsement that payment closed. After issuing required lawyer's notice to the 1st respondent and on seeing that the amount covered by the cheques were not paid, complaints have been filed before the court. Two different complaints were taken in two different cases and the cases were heard and disposed of by a separate judgment. To prove the case against the 1st respondent in both the cases, petitioner himself was examined as PW1 and relied on certain documents such as the

cheques in question, intimation showing dishonouring of the cheques and also certain other documents. After closing the evidence adduced for and on behalf of the petitioner/complainant, the 1st respondent/accused was questioned under Section 313 of the Code. In both the cases, the 1st respondent had denied the alleged transaction contained in the complaints and stated that he had not issued any cheques in favour of the petitioner/complainant whereas, he admitted that he had borrowed an amount of Rs.30,000/= from one Mohammed Saly of Erattupetta and at the time of accepting of Rs.30,000/= from Mohammed Saly, he had issued two cheques and even after payment of the amount which he had received from Mohammed Saly, the cheques were returned to him and these cheques were being misused by the complainant for and on behalf of the said Mohammed Saly. After considering the entire evidence, the trial court found that the petitioner miserably failed to prove the transaction, which led to passing of the cheques in question and the petitioner/complainant did not prove that no such transaction exists and also the cheques in question were issued in favour of the petitioner. Holding the above findings, the trial court acquitted the 1st respondent in both the cases. Against that acquittal, these special leave petitions have been filed.

2. This Court heard the learned counsel appearing for the petitioner and perused the records made available. The learned counsel also placed before me deposition of the complainant and also some other records to show that there was transaction between the appellant and the 1st respondent. After going through the complaints in both the cases, this Court see that the complainant had not stated the details regarding the transaction and even, the date of payment of the amount to the 1st respondent was also not mentioned in the complaint.

3. Interestingly to note that, today, the counsel for the petitioner/complainant placed reliance on a document alleged to have been sent by the 1st respondent to the appellant for the return of the cheques in question as Annexure-A1. But, this document was not admitted or produced before the court for perusal by the lower court. Hence, this Court feels that such documents cannot be considered at this stage. Apart from that, the specific case set up by the complainant/petitioner in both the complaints was that the 1st respondent had borrowed an amount of Rs.1,20,000/= and for the return of the said amount, the 1st respondent had issued two cheques of different dates for Rs.60,000/=. PW1 had admitted in

the court that he had not mentioned the date on which the amount has been given to the 1st respondent. Further, either in the complaints or in the evidence before the court nothing was mentioned when PW1 was examined. He has no case that the 1st respondent had issued notice to the complainant admitting any transaction. Though the reply alleged to have been sent by the 1st respondent was marked as Ext.P7, in which it is stated that he had some transactions with the petitioner/complainant and requested to return the cheques, which the petitioner had in his possession. These two documents would show that these are even prior to presentation of the cheques for encashment in the Bank and prior to intimation of dishonouring of the cheques from the concerned Bank. If so, these documents were not even mentioned in the complaints as well as in the evidence before the court. Apart from that, the complainant/petitioner himself admits that he is residing in a rented house and he is a Chumattuthozhilali engaged in Kolthady Trade Union. Though the petitioner had produced some documents to show that he was maintaining an account in a Bank, the source of the amount which he had alleged to have been paid to the 1st respondent has not been properly explained. Apart from that, as per the principles laid down by this Court in **Kmalammal v. C.K.**

Mohanan (2006(3) KLJ 95) and also in the decision of the Apex Court reported in **Narayana Menon v. State of Kerala** (2006 (3) KLT 404), it was categorically held that the complainant should prove specifically the transaction between himself and the 1st respondent which led to passing of the cheques in question and even if the complainant failed to prove the transaction that there exists legally enforcible debt for receipt of a signed cheque or possession of any cheque alleged to have been singed by the 1st respondent, that by itself will not attract an offence under Section 138 of the N.I.Act.

In the light of the above legal position accepted by this Court as well as the Apex Court, this Court is of the view that the trial court is fully justified in arriving a conclusion that the petitioner miserably failed to prove the transaction so as to attract an offence under Section 138 of the N.I.Act against the 1st respondent. Apart from that, this is an admitted case before the court that the 1st respondent had already filed certain complaints before the Superintendent of Police, Kottayam regarding interference of the appellant and other henchmen, the said Mohammed Saly and a case was already pending against the said Mohammed Saly and

others. In the above circumstances, this Court see no ground to interfere with the judgment of the trial court. Accordingly, special leave to appeals stand dismissed as merit less.

K. THANKAPPAN, JUDGE.

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